Diong Tieow Hong & Anor v Amalan Tepat Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S6–22–1549 OF 2004
ABDUL MALIK ISHAK J
20 JANUARY 2008

Contract — Breach — Declaration — Abandoned housing project — Whether declaration that sale and purchase agreement ('SPA') properly terminated correct procedure — Housing Developers (Control and Licensing) Regulations 1989 Schedule H — Rules of the High Court 1980 O 81

Contract — Breach — Termination — Abandoned housing project — Whether there was time limit for purchaser to terminate SPA — Whether purchaser retained right to terminate so long as vendor still in breach

Contract — Sale and purchase of property — Remedies — Abandoned housing project — Liquidated ascertained damages (LAD) — Claim for — Whether notice of intention to claim LAD required — Whether s 56(3) of the Contracts Act 1950 applicable

Contract — Sale and purchase of property — Sale and purchase agreement — Purchase price not fully paid — Whether purchaser entitled to claim LAD — Whether right to claim LAD only arises after payment of full purchase price

The plaintiffs entered into a sale and purchase agreement ('SPA') with the defendant (developer) for the purchase of a condominium at the purchase price of RM287,900. The SPA was as per the prescribed Schedule 'H' of the Housing Developers (Control and Licensing) Regulations 1989 ('Schedule H'). Pursuant to cll 22 & 24 of the SPA, the defendant should deliver vacant possession of the property, complete with common facilities on or before 14 October 1998. Unfortunately, the defendant failed to do so and the project had been abandoned. The plaintiffs had paid a total sum of RM57,000 towards the purchase price. The plaintiffs, vide letter dated 8 March 2004, demanded the construction of the property be completed and that vacant possession be handed over on or before 8 May 2004, failing which the SPA shall be deemed terminated. Again, the defendant failed to do so. The plaintiffs then initiated a claim against the defendant for, inter alia, declarations to the effect that the defendant had breached the terms of the

SPA and that the plaintiffs had duly terminated the same, refund of RM57,900 and liquidated ascertained damages ('LAD'). Subsequently, the plaintiffs filed an application pursuant to O 81 of the Rules of High Court 1980 ('the RHC') for summary judgment against the defendant.

Held, allowing the plaintiffs' application:

(1) It was clear that the defendant did not dispute that it had failed to hand over vacant possession of the property and complete the common facilities. Seeking a declaratory relief after the SPA had been duly terminated under O 81 of the RHC was the correct procedure and upon termination of the SPA, the plaintiffs were entitled to a refund of all the monies paid and this must necessarily include the part payment of RM57,000 (see para 11).

(2) There was no contractual or statutory period for the plaintiffs to terminate the SPA for breach of contract. So long and as long as the breach of contract continued, the plaintiffs retained the right to terminate the SPA for breach of contract (see para 17).

(3) There was no legal obligation to give any notice of an intention to claim for LAD for an SPA under Schedule H. It must be emphasised that the Housing Developers (Control and Licensing) Act 1966 was a specific piece of legislation enacted to protect the interests of house buyers and the provisions therein, including the prescribed agreements, override the provisions of the general Contracts Act 1950 ('the Act') including s 56(3) thereof (see para 21).

(4) The requirement to give notice of the claim for LAD under s 56(3) of the Act only applied if the plaintiffs had indicated to the defendant when the SPA became voidable (that was, on 14 October 1998) or soon thereafter that the plaintiffs were willing to accept delivery of vacant possession at a later time (see para 22(a)).

(5) The defendant's submission that the LAD was only payable to house buyers who had paid the purchase price in full, if accepted, would result in grave injustice. The house buyers who suffered the most were those who had purchased into a project which was later abandoned. This was quite common in this country and it was a sad state of affairs. In an abandoned project, the purchase price would not have been paid in full because the house was not completed, and the defendant had the audacity to argue that in such a situation, the house buyer had no recourse for LAD. That cannot be the law (see para 23).

(6) So far as cl 22(2) of the SPA was concerned, it was very clear that the plaintiffs were entitled to claim for LAD immediately after the expiry of

A the contractual deadline for the defendant to hand over vacant possession of the property. There was certainly no ambiguity nor any condition that the plaintiffs could only claim for LAD after the actual handing over of vacant possession of the property as suggested by the defendant (see paras 37–38).

B (7) To hold that developers who delayed the completion of housing projects were not liable to pay LAD would, in fact, be against public policy because house buyers would then had no protection against unscrupulous or recalcitrant developers (see paras 32 & 36).

C **[Bahasa Malaysia summary**

Plaintif telah memasuki satu perjanjian jual beli ('SPA') dengan defendan ('pemaju') untuk membeli sebuah kondominium pada harga belian
D RM287,900. SPA adalah seperti yang ditetapkan oleh Jadual 'H' Peraturan-Peraturan Pemaju Perumahan (Kawalan dan Perlesenan) 1989 ('Jadual H'). Menurut klausa 22 dan 24 SPA, defendan harus menyerahkan milikan kosong hartanah tersebut, lengkap dengan kemudahan asas pada atau sebelum 14 Oktober 1998. Malangnya, defendan gagal melaksanakannya dan
E projek tersebut terbengkalai. Plaintif telah membayar sejumlah RM57,000 untuk harga belian. Plaintif, melalui surat bertarikh 8 Mac 2004, telah menuntut pembinaan hartanah tersebut disiapkan dan milikan kosong diserahkan pada atau sebelum 8 Mei 2004 dan kegagalan melakukannya akan menyebabkan SPA dianggap ditamatkan. Sekali lagi defendan gagal
F melakukannya. Plaintif kemudiannya memulakan tuntutan terhadap defendan untuk, antara lain, deklarasi bahawa defendan telah memungkiri terma-terma SPA dan oleh itu plaintif telah menamatkannya, pengembalian wang sejumlah RM57,900 dan ganti rugi jumlah tertentu yang ditetapkan ('LAD'). Kemudian, plaintif telah memfailkan permohonan menurut A 81
G Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk memasukkan penghakiman terus terhadap defendan.

Diputuskan, membenarkan permohonan plaintif:

H (1) Adalah jelas bahawa defendan tidak mempertikaikan bahawa ia telah gagal untuk menyerahkan milikan kosong hartanah tersebut dan melengkapkan kemudahan asas. Memohon relief deklarasi bahawa SPA telah terbatal di bawah A 81 KMT adalah prosedur yang betul dengan
I penamatan SPA, plaintif berhak kepada pengembalian kesemua wang yang telah dibayar dan ini termasuk sebahagian pembayaran sejumlah RM57,000 (lihat perenggan 11).

(2) Tidak terdapat tempoh kontraktual atau statutori bagi plaintif menamatkan SPA bagi kemungkiran kontrak. Selagi mana

kemungkiran kontrak berlarutan, plaintif mengekalkan haknya untuk menamatkan SPA bagi kemungkiran kontrak (lihat perenggan 17).

(3) Tiada kewajipan dari segi undang-undang untuk memberikan apa-apa notis niat untuk menuntut LAD bagi SPA di bawah Jadual H. Ia perlu ditekankan bahawa Akta Pemaju Perumahan (Kawalan dan Perlesenan) 1966 adalah satu undang-undang spesifik yang digubal bagi melindungi pembeli-pembeli rumah dan peruntukan-peruntukan yang terkandung di dalamnya termasuk perjanjian yang dinyatakan, mengatasi peruntukan am Akta Kontrak 1950 ('Akta tersebut') termasuk s 56(3) (lihat perenggan 21).

(4) Keperluan untuk memberikan notis tuntutan bagi LAD di bawah s 56(3) Akta tersebut hanya terpakai jika plaintif telah menunjukkan kepada defendan bila SPA menjadi boleh batal (iaitu pada 14 Oktober 1998) atau sejurus selepas itu bahawa plaintif sanggup menerima penyerahan milikan kosong pada satu masa yang lebih lewat (lihat perenggan 22(a)).

(5) Hujahan defendan bahawa LAD hanya boleh dibayar kepada pembeli-pembeli rumah yang telah membayar keseluruhan harga belian, jika diterima, akan mengakibatkan ketidakadilan yang serius. Pembeli rumah yang paling menderita adalah mereka yang membuat pembelian dari projek yang kemudiannya terbengkalai. Ia adalah agak biasa di negara ini dan ia merupakan keadaan yang menyedihkan. Dalam projek yang terbengkalai, harga belian masih belum dibayar secara penuh kerana rumah masih belum disiapkan, dan defendan sangat lancang untuk mempertikaikan bahawa dalam situasi tersebut, pembeli rumah tidak boleh menuntut LAD. Ia tidak dimaksudkan begitu oleh undang-undang (lihat perenggan 23).

(6) Setakat yang berkaitan dengan klausa 22(2) SPA tersebut, adalah jelas bahawa plaintif berhak untuk menuntut LAD sebaik sahaja tamat had masa kontrak untuk defendan memberikan milikan kosong hartanah tersebut. Jelas tidak terdapat kesamaran atau apa-apa syarat bahawa plaintif hanya boleh menuntut LAD selepas penyerahan sebenar milikan kosong hartanah tersebut seperti yang disarankan oleh defendan (lihat perenggan 37–38).

(7) Untuk memutuskan bahawa pemaju yang lewat dalam menyiapkan projek perumahan adalah tidak bertanggungan untuk membayar LAD, sebenarnya, adalah bertentangan dengan polisi awam kerana pembeli rumah tidak mempunyai perlindungan terhadap pemaju yang tidak berprinsip atau keras kepala (lihat perenggan 32 & 36).]

Notes

For a case on declaration, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2616.

For a case on remedies, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 4998.

For a case on termination, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2713.

For cases on sale and purchase agreement, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5111–5114.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)

Barnato, Re [1949] Ch 258 (refd)

Brisdale Resources Sdn Bhd v Law Kim [2004] 6 MLJ 76 (refd)

Choong Mee Leng v Lam Chong Seng [2005] 5 MLJ 97 (refd)

Cotra Enterprises Sdn Bhd v Pakatan Mawar (M) Sdn Bhd [2001] MLJU 358 (refd)

Country & Metropolitan Homes Surrey Ltd v Topclaim Ltd [1996] Ch 307; [1996] 3 WLR 525 (refd)

Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29 (refd)

Datuk Syed Kechik bin Syed Mohamed v The Governments of Malaysia & Anor [1979] 2 MLJ 101 (refd)

Hariram a/l Jayaram & Ors v Sentul Raya Sdn Bhd [2003] 1 MLJ 22 (refd)

Harold Wood Brick Co Ltd v Ferris [1935] 2 KB 198 (refd)

Harrison v Croydon London Borough Council [1968] Ch 479 (refd)

Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd [1999] 1 MLJ 65 (refd)

Insofex Sdn Bhd v Labasama Group Sdn Bhd [2000] 7 MLJ 408 (refd)

Insun Development Sdn Bhd v Azali bin Bakar [1996] 2 MLJ 188 (refd)

Kang Yoon Mook Xavier v Insun Development Sdn Bhd [1995] 2 MLJ 91 (refd)

Loh Kooi Choon v The Government of Malaysia [1977] 2 MLJ 187 (refd)

Neoh Khoon Lye v Trans-Intan Sdn Bhd [2002] 6 MLJ 8 (refd)

Ng Weng Sum v Lembah Beringin Sdn Bhd [2002] 7 MLJ 211 (distd)

Nixon v Attorney-General [1930] 1 Ch 566 (refd)

Penang Development Corporation v Teoh Eng Huat & Anor [1993] 2 MLJ 97 (refd)

Petaling Tin Bhd v Lee Kian Chan & Ors [1994] 1 MLJ 657 (refd)

Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd [1921] 2 AC 438 (refd)

Steedman v Drinkle & Anor [1916] 1 AC 275 (refd)

Tai Kim Yew & Ors v Sentul Raya Sdn Bhd [2004] 4 MLJ 227 (refd)

Teck Guan Trading Sdn Bhd v Hydrotek Engineering (S) Sdn Bhd & Ors [1996] 4 MLJ 331 (refd)

Union Eagle Ltd v Golden Achievement Ltd [1997] AC 514 (refd)

Legislation referred to

Contracts Act 1950 s 56(3)
Housing Developers (Control and Licensing) Act 1966 Schedule 'H'
Housing Developers (Control and Licensing) Regulations 1989 Schedule 'H'
Rules of the High Court 1980 O 14, O 25 r 5, O 81, O 81 r 1(1)

Pang Kong Leng (Cheah Teh & Su) for the plaintiff.
Andrew KC Ng (Yeo & Yeo) for the defendant.

Abdul Malik Ishak J:

INTRODUCTION

[1] By way of encl 6, the plaintiffs applied for summary judgment against the defendant pursuant to O 81 of the Rules of the High Court 1980 ('the RHC'). In its original text, encl 6 was worded in this way:

(a) Satu perisytiharan bahawa defendan telah memungkiri terma-terma perjanjian jual beli bertarikh 14 Oktober 1995 yang dimasuki di antara kedua-dua plaintif dan defendan dan bahawa plaintif-plaintif telah menamatkan perjanjian jual beli tersebut bersama dengan surat ikatan waad-waad bersama bertarikh 14 Oktober 1995;

(b) jumlah-jumlah sebanyak RM57,900, RM160,249.67 dan RM32,049.92;

(c) faedah ke atas jumlah sebanyak RM57,900 pada kadar 8% setahun dari 9 Mei 2004 sehingga sehari sebelum penghakiman;

(d) faedah ke atas jumlah sebanyak RM192,299.59 (yang merupakan jumlah RM160,249.67 dan RM32,049.92) pada kadar 8% setahun untuk tempoh di antara 15 Oktober 1998 sehingga 8 Mei 2004 yang berjumlah RM7,165.40;

(e) faedah ke atas jumlah sebanyak RM192,299.59 (yang merupakan jumlah RM160,249.67 dan RM32,049.92) pada kadar 8% setahun untuk tempoh dari 9 Mei 2004 sehingga sehari sebelum penghakiman;

(f) gantirugi-gantirugi am dan khas untuk ditaksirkan oleh pendaftar;

(g) faedah ke atas gantirugi-gantirugi am dan khas sepertimana yang ditaksirkan oleh pendaftar pada kadar 8% setahun dari 9 Mei 2004 sehingga sehari sebelum penghakiman;

(h) faedah ke atas jumlah penghakiman yang kadar 8% setahun dari tarikh penghakiman sehingga penyelesaian penuh;

(i) kos; dan

(j) relif dan/atau perintah selanjutnya dan/atau selainnya yang mahkamah yang mulia ini anggap suaimanfaat dan adil.'

[2] Enclosure 6 must be read with the prayers in para 8 of encl 23 and, in its original text, it was worded in this fashion:

(a) Satu perisytiharan bahawa defendan telah memungkiri terma-terma perjanjian jual beli bertarikh 14 Oktober 1995 yang dimasuki di antara kedua-dua plaintif dan defendan dan bahawa plaintif-plaintif telah menamatkan perjanjian jual beli tersebut bersama dengan surat ikatan waad-waad bersama bertarikh 14 Oktober 1995;

(b) jumlah-jumlah sebanyak RM57,900, RM148,339.29 dan RM29,667.85;

(c) faedah ke atas jumlah sebanyak RM57,900 pada kadar 8% setahun dari 9 May 2004 sehingga sehari sebelum penghakiman;

(d) faedah ke atas jumlah sebanyak RM178,007.14 (yang merupakan jumlah RM148,339.29 dan RM29,667.85) pada kadar 8% setahun untuk tempoh di antara 15 Mac 1999 sehingga 8 Mei 2004 yang berjumlah RM6,603.24;

(e) faedah ke atas jumlah sebanyak RM178,007.14 (yang merupakan jumlah RM148,339.29 dan RM29,667.85) pada kadar 8% setahun untuk tempoh dari 9 Mei 2004 sehingga sehari sebelum penghakiman;

(f) ganti rugi am dan khas untuk ditaksirkan oleh Pendaftar;

(g) faedah ke atas gantirugi-gantirugi am dan khas sepertimana yang ditaksirkan oleh pendaftar pada kadar 8% setahun dari 9 Mei 2004 sehingga sehari sebelum penghakiman;

(h) faedah ke atas jumlah penghakiman pada kadar 8% setahun dari tarikh penghakiman sehingga penyelesaian penuh;

(i) kos; dan

(j) relif dan/atau perintah selanjutnya dan/atau selainnya yang mahkamah yang mulia ini anggap suaimanfaat dan adil.

[3] Order 81 r 1(1) of the RHC reads as follows:

ORDER 81

ACTIONS FOR SPECIFIC PERFORMANCE, ETC SUMMARY JUDGMENT

1 Application by plaintiff for summary judgment (O 81 r 1)

(1) In any action begun by writ indorsed with a claim:

(a) for specific performance of an agreement (whether in writing or not) for the sale, purchase or exchange of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages; or

(b) for rescission of such an agreement; or

(c) for the forfeiture or return of any deposit made under such an agreement,

the plaintiff may, on the ground that the defendant has no defence to the action, apply to the court for judgment.

THE FACTUAL MATRIX

[4] The plaintiffs entered into a sale and purchase agreement dated 14 October 1995 ('SPA') with the defendant — the developer, for the purchase of a condominium ('the property') located at the 'A Famosa Villa De Agua Condominium' at the purchase price of RM287,900. The SPA has been exhibited as exh 'DKJ–1' annexed to encl 5. That SPA is as per the prescribed Schedule 'H' of the Housing Developers (Control and Licensing) Regulations 1989.

[5] It would now be ideal to reproduce the relevant clauses of the SPA and I shall do so now (see exh 'DKJ-1' annexed to encl 5):

7 Time essence of contract

Time shall be the essence of the contract in relation to all provisions of this Agreement.

22 Time for handing over of vacant possession

(1) Vacant possession of the said Parcel to which water and electricity supply are ready for connection shall be handed over to the Purchaser within thirty-six (36) calendar months from the date of this Agreement.

(2) If the Vendor fails to hand over vacant possession of the said Parcel, to which water and electricity supply are ready for connection to the said Parcel, in time, the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price.

23 Manner of delivery of vacant possession

(1) Upon the issuance of a Certificate by the Vendor's Architect certifying that the construction of the said Parcel has been duly completed and water and electricity supply are ready for connection to the said Parcel and the Vendor has applied for the issuance of the Certificate of Fitness for Occupation from the Appropriate Authority and the Purchaser having paid all monies payable under clause 4(1) in accordance with the Third Schedule and all other monies due under this Agreement and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement the Vendor shall let the Purchaser into possession of the said Parcel;

PROVIDED THAT such possession shall not give the Purchaser the right to occupy and the Purchaser shall not occupy the said Parcel until such time as the Certificate of Fitness for Occupation for the said Building is issued.

(2) Upon the expiry of fourteen (14) days from the date of a notice from the Vendor requesting the Purchaser to take possession of the said Parcel, whether or not the Purchaser has actually entered into possession or occupation of the said Parcel, the Purchaser shall be deemed to have taken delivery of vacant possession.

24 Completion of common facilities

(1) The common facilities serving the said housing development shall be completed by the Vendor within thirty six (36) calendar months from the date of this Agreement.

(2) If the Vendor fails to complete the common facilities in time the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the last twenty per centum (20%) of the purchase price.

[6] It is quite apparent that cl 7 of the SPA stipulates time to be the essence of the contract. And any failure to perform such a stipulation justifies rescission. It makes not a whit of a difference that the failure to perform pertains to a trivial matter or that it causes little or no prejudice at all to the injured party. Whether a stipulation as to time is of the essence or otherwise, it can easily be resolved by looking at the terms of the contract itself. Here, time, as I said, is of the essence and it is expressly stated to be so in cl 7 of the SPA. That being the case, the contract must be performed within the stipulated time (*Steedman v Drinkle & Anor* [1916] 1 AC 275; *Country & Metropolitan Homes Surrey Ltd v Topclaim Ltd* [1996] Ch 307 at p 313; and *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514). In *Harold Wood*

Brick Co Ltd v Ferris [1935] 2 KB 198, the contract provided for completion by August 31 and it added the following passage, 'the purchase shall in any event actually be completed not later than September 15'. The court held that this clause made time to be the essence of the contract. I will now continue with the narration of the facts.

[7] The plaintiffs had paid in total the sum of RM57,000 to the defendant under the SPA and the receipt for such payment can be seen in exhibit marked as 'DKJ–3' annexed to encl 5. Pursuant to cll 22 and 24 of the SPA, the defendant shall hand over vacant possession of the property and complete the common facilities on or before 14 October 1998. Unfortunately, the defendant failed to do so.

[8] By their letter addressed to the defendant dated 8 March 2004, the plaintiffs demanded that the construction of the property be completed and that vacant possession be handed over on or before 8 May 2004 and failing which the SPA shall be deemed terminated. That letter of termination can be seen in exh 'DKJ–4' annexed to encl 5. Again, the defendant failed to do so.

DECLARATIONS

[9] The plaintiffs sought two declarations to the effect that the defendant has breached the terms of the SPA and that the plaintiffs have duly terminated the SPA. It is trite that declaration is a discretionary remedy. And the courts have been firm and alert in preventing its abuse. The inherent powers of the court enables it to refuse relief to busybodies and speculators and to those litigants who ask hypothetical questions just like the case of in *Re Barnato* [1949] Ch 258 and the case of *Harrison v Croydon London Borough Council* [1968] Ch 479. The court will also refuse relief to those who have no sufficient interest at all.

[10] A declaration does no more than declare what the legal rights of the parties are. It has no coercive force and it does not quash any decision already taken by an administrative authority. The advantages of obtaining a declaration are minimal. Firstly, it serves to secure the relief before the damage is caused. Secondly, it would clarify the legal position of the parties (*Petaling Tin Bhd v Lee Kian Chan & Ors* [1994] 1 MLJ 657 at 673; and *Datuk Syed Kechik bin Syed Mohamed v The Governments of Malaysia & Ors* [1979] 2 MLJ 101). And according to Raja Azlan Shah Acting LP (as His Majesty then was) in *Dato' Menteri Othman bin Baginda & Ors v Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, at p 31, a declaration can be used in a 'wide range of circumstances' and in a 'wide variety of cases in terms of subject-matter'. Declaratory proceedings are simple, speedy and cheap. If the declaration that is asked for is based on questions of law and no important

facts are in dispute, then the proceedings may be proceeded by way of originating summons and conducted solely on affidavits. Clauson J in *Nixon v Attorney-General* [1930] 1 Ch 566, at p 574 aptly said that, 'the declaration of right means in my opinion declaration of legal right, and I have no power to make any declaration, even if I desired to make one, except a declaration, as I read the rule (O 25 r 5), of a legal right'. The court would not be concerned with theoretical issues. In the words of Lord Dunedin in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438, at p 448:

> The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought.

ANALYSIS

[11] From the cause papers, it is clear that the defendant does not dispute that it has failed to hand over vacant possession of the property and complete the common facilities. Seeking a declaratory relief that the SPA has been duly terminated under O 81 of the RHC is the correct procedure (*Cotra Enterprises Sdn Bhd v Pakatan Mawar (M) Sdn Bhd* [2001] MLJU 358; and *Choong Mee Leng v Lam Chong Seng* [2005] 5 MLJ 97, CA). And upon termination of the SPA, the plaintiffs are entitled to a refund of all the monies paid and this must necessarily include the part payment of RM57,000. In *Kang Yoon Mook Xavier v Insun Development Sdn Bhd* [1995] 2 MLJ 91, at p 96, I had occasion to say the same thing in this way:

> In my judgment, the plaintiff is entitled to terminate the S & P agreement and obtained the 10% of the purchase price; this course of action would place the plaintiff in a position like as though he did not enter into the S & P agreement at all.

[12] In regard to the liquidated and ascertained damages ('LAD') for the period between 15 October 1998 to 8 May 2004 of RM160,249.67 for the delay in handing over vacant possession of the property and the sum of RM32,049.92 for the delay in completing the common facilities, the calculations for these figures are amply set out in paras 12(b) and 12(c) of encl 5 and I shall now reproduce them verbatim in its original text:

(b) Gantirugi jumlah tertentu berkenaan dengan kelewatan dalam penyerahan milikan kosong hartanah tersebut untuk tempoh dari 15 Oktober 1998 hingga 8 Mei 2004 berjumlah RM160,249.67.

Tahun	Pengiraan	Jumlah
1998	78 hari/365 hari x RM287,900 x 10%	RM 6,152.38
1999	1 tahun x RM287,900 x 10%	RM28,790.00
2000	1 tahun x RM287,900 x 10%	RM28,790.00
2001	1 tahun x RM287,900 x 10%	RM28,790.00
2002	1 tahun x RM287,900 x 10%	RM28,790.00
2003	1 tahun x RM287,900 x 10%	RM28,790.00
2004	129 hari/366 hari x RM287,900 x 10%	RM10,147.29
		RM160,249.67

(c) Gantirugi jumlah tertentu berkenaan dengan kelewatan dalam menyiapkan kemudahan-kemudahan bersama untuk tempoh dari 15–10–1998 hingga 8–5–2004 berjumlah RM32,049.92.

Tahun	Pengiraan	Jumlah
1998	78 hari/365 hari x RM57,580 x 10%	RM 1,230.47
1999	1 tahun x RM57,580 x 10%	RM5,758.00
2000	1 tahun x RM57,580 x 10%	RM5,758.00
2001	1 tahun x RM57,580 x 10%	RM5,758.00
2002	1 tahun x RM57,580 x 10%	RM5,758.00
2003	1 tahun x RM57,580 x 10%	RM5,758.00
2004	129 hari/366 hari x RM57,580 x 10%	RM2,029.45
		RM32,049.92

A purchaser is entitled to terminate the SPA and claim for LAD up to the date of the termination. And this is what the plaintiffs in this case are claiming for. In *Kang Yoon Mook Xavier v Insun Development Sdn Bhd*, I had this to say at p 98 of the report:

> It is now trite law that where a party to a contract refuses altogether to perform or is disabled from performing his part of it, the other side has the right to rescind it *(Choo Yin Loo v Visuvalingam Phillay* [1930] 7 FMSLR 135). Rescission of

A contract with regard to repudiatory breach is not meant to be rescission ab initio. In *Chye Fook*'s case, for instance, the purchaser could rescind and claim for liquidated damages forthwith.

Continuing at p 99 of the same case, I concluded as follows:

B

> For the reasons adumbrated above, I ordered that the defendant shall pay immediately to the plaintiff liquidated damages calculated from day to day at the rate of 10% pa of the purchase price of RM27,680 commencing from 18 August 1988 (the date of vacant possession) to 5 June 1994 (the date of termination of the S & P agreement). Costs should rightly go to the plaintiff.

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In so far as the general and special damages are concerned, I have this to say. The plaintiffs are entitled to post rescissionary damages and these damages must be assessed by the senior assistant registrar. Again, in *Kang Yoon Mook Xavier v Insun Development Sdn Bhd* at p 97, I had occasion to say the same thing:

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> In addition to that, an order for post-rescissionary damages in favour of the plaintiff was also made, and these should be assessed by the senior assistant registrar by virtue of O 28 r 4 of the Rules of the High Court 1980 (see also *Tan Yang Long*'s case). Incidentally, the post-rescissionary damages (prayer 4 of encl 3) relate to the compensation which the plaintiff sustained through the non-fulfilment of the contract as envisaged under s 76 of the Contracts Act 1950.

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[14] It is now appropriate to state briefly the general principles of law. It is this. That an application under O 81 of the RHC is akin to an application under O 14 of the RHC (see *Insofex Sdn Bhd v Labasama Group Sdn Bhd* [2000] 7 MLJ 408, at p 420 where the court said: *'O 81 of the RHC is akin to that of O 14 of the RHC and it enables the plaintiff to obtain summary judgment without a trial'*). And the duty of the court hearing an application under O 14 of the RHC is set out in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, SC, particularly at p 408 of the report. There, writing the majority judgment of the court, Mohamed Azmi SCJ had this to say:

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> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are

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triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand', (see *Cow v Casey* [1949] 1 All ER 197 and *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508 at p 516).

[15] Learned counsel for the defendant took exceptions and raised the following salient issues:

(a) whether the plaintiffs are entitled to terminate the SPA 5½ years after the deadline for completion?;

(b) whether the plaintiffs are entitled to claim for LAD since the plaintiffs did not give any notice of their intention to claim for LAD when the deadline expired?; and

(c) whether the plaintiffs are entitled to claim for LAD for the five months' period extended by the Housing Controller?

[16] I shall now consider these three issues in quick succession.

THE FIRST ISSUE

[17] Not a single authority was advanced by learned counsel for the defendant to support the first issue. It must be borne in mind that there is no contractual or statutory period for the plaintiffs to terminate the SPA for breach of contract. So long and as long as the breach of contract continues, the plaintiffs retain the right to terminate the SPA for breach of contract. In *Kang Yoon Mook Xavier v Insun Development Sdn Bhd*, the notice of termination was issued on 20 May 1994 more than 5½ years later after the deadline for the delivery of vacant possession of the house on 18 August 1988 and it was held that the purchaser was entitled to terminate the SPA.

THE SECOND ISSUE

[18] Learned counsel for the defendant in advancing the second issued relied on two cases, namely, *Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65 (CA); and *Teck Guan Trading Sdn Bhd v Hydrotek Engineering (S) Sdn Bhd & Ors* [1996] 4 MLJ 331 (HC). With respect, both these cases can readily be distinguished on the facts.

Hock Huat's case revolves on an agreement for the construction and sale of a factory and an office whereas *Teck Guan*'s case centres on an agreement for the sale of round bars. Both these two cases do not concern the sale of a condominium according to Schedule 'H' of the Housing Developers (Control and Licensing) Regulations 1989. Whereas in the present case before me, the SPA concerns the construction and sale of a condominium in accordance with the said Schedule 'H' of the said Regulations. The agreements in both the two cases cited by learned counsel for the defendant are not governed or regulated by the Housing Developers (Control and Licensing) Act 1966 and they are certainly unlike the sale of a residential condominium. Furthermore, in both these two cases, the factory and the office as well as the round bars were all delivered albeit after some delay and the aggrieved parties did not terminate the contracts. Here, in the present case, the condominium was never completed and the plaintiffs had terminated the SPA.

[19] There is no legal obligation to give any notice of an intention to claim for LAD for an SPA under Schedule 'H' of the Housing Developers (Control and Licensing) Regulations 1989. It must be emphasised that the Housing Developers (Control and Licensing) Act 1966 is a specific piece of legislation enacted to protect the interests of house buyers and the provisions therein, including the prescribed agreements, override the provisions of the general Contracts Act 1950 including s 56(3) thereof. In *Hariram a/l Jayaram & Ors v Sentul Raya Sdn Bhd* [2003] 1 MLJ 22, at p 41, I had this to say:

> Likewise here, the sale and purchase agreements made in accordance with Schedule 'H' to the Housing Regulations which were in turn made under the Housing Act must take precedence over the Contracts Act 1950. Being a specific piece of social legislation enacted solely to protect house buyers from unscrupulous developers, the standard sale and purchase agreements signed by the plaintiffs must take precedence over the Contracts Act 1950 and must be given effect accordingly.

Continuing at p 43 and spilling over to p 44, this was what I said in the same case:

> Incidentally, if Parliament intended that the plaintiffs as purchasers must notify the defendant as developer of the plaintiffs' intention to claim liquidated ascertained damages before making such a claim, then Parliament would have manifested that intention in the standard sale and purchase agreements which the plaintiffs have signed. The fact that there was no such requirement incorporated in the standard sale and purchase agreements showed, on the balance of probabilities, that Parliament had never intended to impose such a burden on the plaintiffs as the purchasers of those condominium units. This conclusion is fortified by the words which Parliament employed in cll 22(2) and 24(2) of the standard sale and purchase agreements which read, inter alia, that 'the vendor shall pay immediately to the purchaser liquidated damages'. To read and apply s 56(3) of the Contracts Act 1950 into a claim for liquidated ascertained damages that was guaranteed

under the Housing Act wherein the Housing Regulations were made would only lead to absurdity because it would remove the very protection that Parliament had guaranteed to the plaintiffs as purchasers of the condominium units. A

[20] In regard to the present case, factually speaking, it is germane to say that s 56(3) of the Contracts Act 1950 does not apply. The reasons for the non-application are as follows: B

(a) The requirement to give notice of the claim for LAD under s 56(3) of the Contracts Act 1950 only applies if the plaintiffs had indicated to the defendant when the SPA became voidable (that is, on 14 October 1998) or soon thereafter that the plaintiffs are willing to accept delivery of vacant possession at a later time. In the same vein, I had this to say in *Hariram a/l Jayaram & Ors v Sentul Raya Sdn Bhd* at p 45: C

> Section 56(3) of the Contracts Act 1950 would only apply if and only if the plaintiffs as the purchasers have indicated to the defendant as the developer when the contracts became voidable and that would be on the original completion dates or soon thereafter. Here, there was no evidence whatsoever of any indication by the plaintiffs and for that reason s 56(3) of the Contracts Act 1950 do not apply. D E
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> Here, the plaintiffs did not give the defendant any such indication.

(b) As a matter of interpretation, the presence of the words 'shall pay immediately' in cll 22(2) and 24(2) of the SPA would negate the need to give such a notice. Again, in the same vien, I had this to say in *Hariram a/l Jayaram & Ors v Sentul Raya Sdn Bhd* at p 48: F

> Now, taking these arguments in its correct perspective and to its logical conclusion, it must be emphasised that the word 'immediately' that appears in both cll 22(2) and 24(2) of the sale and purchase agreements which have been reproduced earlier would mean that the purchasers have the right to claim the liquidated ascertained damages without giving the requisite notices to the defendant under s 56(3) of the Contracts Act 1950. G H
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> And in *Tai Kim Yew & Ors v Sentul Raya Sdn Bhd* [2004] 4 MLJ 227, my brother judge Mohd Hishamudin J, echoed the same sentiment (see p 233 of the report):
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> > The presence of the words 'shall pay immediately' in both the clauses is very significant in the interpretation of both the clauses; and what the phrase means is that the right to be paid LAD is automatic once there was a delay by the developer to hand over possession or to complete the common facilities. I

> The developer/defendant must pay the LAD to the purchaser at once, without further ado, once there was a delay. If the right to be paid is automatic, it follows then that there was no obligation on the part of the purchasers/plaintiffs to give any notice to the defendant. The phrase 'shall pay immediately' would be meaningless if the defendant's argument that notice was required were to be accepted.

(c) If the defendant required that a notice ought to be given, then the defendant must expressly provide that in the SPA. This was also the view expressed by Faiza Tamby Chik J (as he then was) in the case of *Brisdale Resources Sdn Bhd v Law Kim* [2004] 6 MLJ 76. There at p 80 of the report, His Lordship had this to say:

> However, there is no provision in the said sale and purchase agreement which requires the plaintiff to give the said notice. If the defendant required notice to be given by the plaintiff as soon as the defendant breached the time in handing over vacant possession, then the defendant should provide for the same as an important term in the sale and purchase agreement by applying to the authorities for approval to add the terms pertaining to the notice.

[21] The defendant's submission that the LAD is only payable to house buyers who have paid the purchase price in full, if accepted, would result in grave injustice. The house buyers who suffer the most are those who have purchased into a project which is later abandoned. This is quite common in this country and it is a sad state of affairs. In an abandoned project, the purchase price would not have been paid in full because the house is not completed. And the defendant has the audacity to argue that in such a situation, the house buyer has no recourse for LAD. That cannot be the law. In my judgment, the defendant must pay the LAD to the plaintiffs.

THE THIRD ISSUE

[22] The defendant disputes the plaintiffs' calculation of the LAD on the basis that the defendant was given a five months' extension to complete the project. Now, if the extension was indeed given, it only affects the quantum of the LAD to be awarded and not the liability of the defendant to pay the LAD.

[23] There is no dispute in respect of the claim for the duration of the delay apart from the five months' period and the LAD, excluding the five months' period, amounts to RM148,339.29 and RM29,667.85 for the delay in the handing over vacant possession of the property and the completion of the common facilities respectively. The calculations for these amounts can be seen

in exh 'DKJ–6' annexed to encl 20 — the affidavit of the second plaintiff by the name of Ding Kwong Jee that was affirmed on 1 August 2005. That exh 'DKJ-6' annexed to encl 20, in its original text, reads as follows:

1. Gantirugi jumlah tertentu berkenaan dengan kelewatan dalam penyerahan milikan kosong Hartanah tersebut untuk tempoh dari 15–3–1999 hingga 8–5–2004 berjumlah RM148,339.29

Tahun	Pengiraan	Jumlah
1999	292 hari/365 hari x RM287,900 x 10%	RM23,032
2000	1 tahun x RM287,900 x 10%	RM28,790
2001	1 tahun x RM287,900 x 10%	RM28,790
2002	1 tahun x RM287,900 x 10%	RM28,790
2003	1 tahun x RM287,900 x 10%	RM28,790
2004	129 hari/366 hari x RM287,900 x 10%	RM10,147.29
		RM148,339.29

2. Gantirugi jumlah tertentu berkenaan dengan kelewatan dalam menyiapkan kemudahan-kemudahan bersama untuk tempoh dari 15–3–1999 hingga 8–5–2004 berjumlah RM29,667.85.

Tahun	Pengiraan	Jumlah
1999	292 hari/365 hari x RM57,580 x 10%	RM 4,606.40
2000	1 tahun x RM57,580 x 10%	RM5,758
2001	1 tahun x RM57,580 x 10%	RM5,758
2002	1 tahun x RM57,580 x 10%	RM5,758
2003	1 tahun x RM57,580 x 10%	RM5,758
2004	129 hari/366 hari x RM57,580 x 10%	RM2,029.45
		RM29,667.85

In my judgment, all the issues raised by the defendant do not merit the case to be tried by way of a full trial. In the words of Faiza Tamby Chik J (as he then was) in *Brisdale Resources Sdn Bhd v Law Kim* at p 89:

> It is clear from the submission of the defendant's solicitor and the affidavit and 'defence' filed that the defendant does not have any defence on merits. In fact, the defendant did not deny that they are in breach of the sale and purchase agreement entered between the plaintiff and the defendant. What was raised were notice, prove of damage and locus wherein these are technicalities and not strict defences on merit deserving a full trial. The matters relating to notice, prove of damage and locus are not something new to the instant case. In fact, it has been dealt with in cases like *Loh Hoon Loi & Ors v Viewpoint Properties (Sabah) Sdn Bhd* [1995] 4 MLJ 804; *Steven Phoa Cheng Loon & 72 Ors v Highland Properties Sdn Bhd & 9 Ors* [2000] 4 MLJ 200; *Bank of Commerce (M) Bhd v Mahajaya Property Sdn Bhd* [1997] 3 MLJ 620 and *Max-Benefit Sdn Bhd v Phuah Thean An & Anor* [2001] 1

MLJ 553 since 1995 wherein decisions made were favourable to the purchasers. This is because the purchasers were the ones having less bargaining power when the sale and purchase agreements were executed and the breach was clearly by the seller.

CONCESSION

As the submissions of the parties unfolded, the defendant expressly conceded that the plaintiffs are entitled to the refund of the payments totaling RM57,900. Premised on this concession alone, judgment should be entered on the sum of RM57,900 together with interest therein.

LIQUIDATED ASCERTAINED DAMAGES ('LAD')

[25] That leaves this court with the sole issue of damages to be decided upon. Now, going on the uphill task, the defendant contends that the plaintiffs are not entitled to claim for LAD and the defendant advances the following reasons:

(a) There is a High Court decision in the case of *Ng Weng Sum v Lembah Beringin Sdn Bhd* [2002] 7 MLJ 211 where the learned judge held that the purchaser there lawfully terminated the SPA for the delay in delivering vacant possession and ordered the developer to refund all payments to the purchaser but the learned judge did not award LAD to the purchaser.

(b) That on the ground of public policy, so the defendant says, to award LAD would discourage 'legitimate' developers from continuing with the construction works for the delayed projects.

(c) The plaintiffs are not entitled to claim for the LAD under the terms of the SPA because the property has not been completed and the plaintiffs have not paid the full purchase price.

[26] It is my judgment that the case of *Ng Weng Sum* can be distinguished on the facts and that case should not be followed for the following reasons:

(a) In *Ng Weng Sum*'s case, the property in question was 'a two-storey shop/office' and not a condominium like our instant case at hand.

(b) The SPA for the sale of a shop or office is not governed or regulated by the Housing Developers (Control and Licensing) Act 1966 unlike the sale of a residential condominium.

(c) The learned judge in *Ng Weng Sum*'s case did not give any reasons at all as to why the purchaser's claim for LAD there is rejected. All that the learned judge said was that (see p 215 at para 'F'):

The plaintiff's claim for liquidated damages was however rejected.

(d) In short, the judgment on the issue of LAD in *Ng Weng Sum*'s case was nothing more than a mere *ipse dixit*.

(e) In sharp contrast, there is an authority directly on the point where the court allowed the purchaser's claim for LAD after terminating the SPA for the delay in delivering vacant possession of the property. And that authority would be the case of *Kang Yoon Mook Xavier v Insun Development Sdn Bhd*.

PUBLIC POLICY

[27] The issue of public policy was considered when the Housing Developers (Control and Licensing) Act 1966 was enacted. The said Act was enacted to protect house buyers from unscrupulous or recalcitrant developers. These adjectives — unscrupulous or recalcitrant, are appropriate to describe developers who fail to complete the housing projects on time. In *Hariram a/l Jayaram & Ors v Sentul Raya Sdn Bhd* at pp 37–38, I had occasion to say the following:

> It must be borne in mind that the Housing Act is a specific piece of social legislation to protect house buyers or purchasers from unscrupulous developers. This was the thinking of the then Federal Court (Suffian LP, Syed Othman and Abdul Hamid FCJJ) in the case of *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31, where Suffian LP speaking for the then Federal Court aptly said at p 34 of the report:
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> > It is common knowledge that in recent years, especially when government started giving housing loans making it possible for public servants to borrow money at 4% interest per annum to buy homes, there was an upsurge in demand for housing, and that to protect home buyers, most of whom are people of modest means, from rich and powerful developers, Parliament found it necessary to regulate the sale of houses and protect buyers by enacting the Act.
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> This approach was also echoed by VC George J in *Khau Daw Yau v Kin Nam Realty Development Sdn Bhd* [1983] 1 MLJ 335 where His Lordship said at p 341 of the report:
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> > The scheme of the Housing Developers (Control and Licensing) Act 1966 and the Rules of 1970 is to provide a measure of protection to purchasers of housing accommodation in a housing development against unscrupulous developers.
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> The same sentiments were shared by the then Federal Court (Lee Hun Hoe CJ (Borneo), Mohamed Azmi and Abdoolcader FCJJ) in *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1985] 1 MLJ 285, when Mohamed Azmi FJ delivering the judgment of the then Federal Court said at p 290 of the report:

> The attempt of the appellants to contract out of the Act is clearly not a device which can be described as legitimate. It is an open defiance of the Housing Developers legislation. Having regard to the policy and objective of Housing Developers Act 1966 and the 1970 Rules made thereunder the protection afforded by this legislation to house buyers is not merely a private right but a matter of public interest which Parliament has intended to protect from being bargained away or renounced in advance by an individual purchaser (see the principle enunciated by the House of Lords in *Johnson v Moreton* [1978] 3 All ER 37, at p 56 and applied by this court in *SEA Housing Corporation v Lee Poh Choo* [1982] 2 MLJ 31, at p 34).

And by the Privy Council (Lord Keith of Kinkel, Lord Fraser of Tulleybelton, Lord Templeman, Lord Ackner and Sir Robert Megarry) in the same case when it went up on appeal vide *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1988] 1 MLJ 69, where Lord Templeman delivering the judgment of the Board said at p 71 of the report:

> This argument makes nonsense of an Act which is clearly designed to protect purchasers from developers, and those purchasers need protection whether the sites of houses are sold before or contemporaneously with or after completion of the houses.

[28] In *Penang Development Corporation v Teoh Eng Huat & Anor* [1993] 2 MLJ 97, SC, Jemuri Serjan CJ (Borneo) speaking for the Supreme Court had this to say (see p 118):

> We are mindful of the fact that the Act was intended to protect innocent buyers from some unscrupulous and dishonest housing developers. There had been instances of developers who abandoned their housing projects when running out of funds to complete them, or heavily indebted to banks or financial institutions and absconded after having accepted deposits or full payments from the prospective buyers, especially during hard times in the property market. Many also had become bankrupts while others disappeared overseas out of the clutches of the law and legal process.

[29] In my judgment, to hold, as suggested by the defendant, that developers who delayed the completion of housing projects are not liable to pay LAD would, in fact, be against public policy because house buyers would then have no protection against unscrupulous or recalcitrant developers.

[30] The phrase 'public policy' has been bandied around in this judgment and it is ideal to define that phrase. No exact definition can be suggested.

Many American authors have offered definitions and I need to cite only three of them:

(a) Thomas R Dye in his book *Understanding Public Policy*, (7th Ed, New York: Prentice Hall, 1992) at pp 2 to 4 defines public policy as 'what governments do, why they do it, and what difference it makes';

(b) David Easton in *A Systems Analysis of Political Life* (New York: Wiley, 1965), at p 212 describes public policy as 'the impacts of government activity'; and

(c) James Anderson in *Public Policymaking*, (3rd Ed, Boston: Houghton Mifflin, 1997) defines the terms as 'a purposive course of action followed by an actor or set of actors in dealing with a problem or matter of concern'.

[31] These definitions talk about a process or a series of governmental activities or decisions that are designed to remedy some public problems, whether real or imaginary. The special characteristic of public policy is this. That it is formulated, implemented and evaluated by the legislators, judges, executives and administrators. It must be borne in mind that public policies are flexible and are always subject to change.

[32] It is now opportune to refer to the case of *Loh Kooi Choon v The Government of Malaysia* [1977] 2 MLJ 187, a decision of Raja Azlan Shah FCJ (as His Majesty then was), and speaking for the Federal Court this was what His Majesty said (see p 188 column ID to E):

> The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meant for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights are guaranteed by the Constitution, for as was said by Lord Macnaghten in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107, at p 118:
>
> > Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the legislature.

[33] That was said in the context of constitutional law. Here, I am concerned with protecting house buyers from unscrupulous or recalcitrant developers and that would come within the wider purview of public policy.

WHEN CAN A PURCHASER CLAIM FOR LAD?

[34] It is the contention of the defendant that the plaintiffs can only claim for LAD when the property is completed and after the plaintiffs have paid the purchase price in full. Now, in so far as cl 22(2) of the SPA is concerned, it is very clear that the plaintiffs are entitled to claim for LAD immediately after the expiry of the contractual deadline for the defendant to hand over vacant possession of the property. This was what I said in *Kang Yoon Mook Xavier v Insun Development Sdn Bhd* at pp 98–99 of the report:

> Two questions come to the forefront here: (i) should the plaintiff wait and not rescind the S & P agreement hoping that the kind Malaysian Government would come to his assistance by reviving the housing project through TPPT?; and (ii) must the plaintiff wait that long after rescinding the S & P agreement (perhaps till doomsday) to sue for the liquidated damages? Surely it is not the intention of the Minister in making the Housing Developers (Control and Licensing) Regulations 1982 (wherein the standard sale and purchase agreement (land and building) was incorporated as Sch E which forms the S & P agreement of present case) to deprive the purchaser of his immediate right to rescind and sue for liquidated damages upon the failure of the developer to deliver vacant possession on the stipulated date! In making the Housing Developers (Control and Licensing) Regulations 1989, the Minister must have thought of the plight of the poor prospective house buyers who are at the mercy of the cunning and rich developers. The language employed in cl 18(2) of the S & P agreement is clear and unambiguous, and its natural meaning relates to the right of the purchaser plaintiff to rescind and to sue immediately for liquidated damages if the recalcitrant developer fails to deliver the said house within 24 months from the date of the S & P agreement.

[35] There is certainly no ambiguity nor any condition that the plaintiffs can only claim for LAD after the actual handing over of vacant possession of the property, as suggested by the defendant. This issue has, fortunately, been decided by the Federal Court in *Insun Development Sdn Bhd v Azali bin Bakar* [1996] 2 MLJ 188. Concisely put, the Federal Court decided that the purchaser can claim for LAD immediately after the expiry of the contractual deadline for delivery of vacant possession and need not wait for the actual completion of the property. The reason given was that cl 18(2) of the SPA in *Insun*'s case specified only the *terminus a quo* (the opening date) but not the *terminus ad quem* (the closing date).

[36] It is germane to mention that cl 22(2) of the SPA in the instant case is exactly the same as cl 18(2) of the SPA in *Insun*'s case save for the words underlined which do not affect the interpretation of the right to claim for LAD. I shall now demonstrate:

(a) Clause 18(2) of the SPA in *Insun*'s case

> If the vendor fails to *deliver* vacant possession of the said *building* in time the vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price (see p 192 of *Insun*'s case).

(b) Clause 22(2) of the SPA in the instant case

> If the vendor fails to *hand over* vacant possession of the said *parcel, to which water and electricity supply are ready* for connection to the said parcel, in time, the vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price.

[37] The courts in *Hariram a/l Jayaram v Sentul Raya Sdn Bhd*, *Tai Kim Yew & Ors v Sentul Raya Sdn Bhd*, and *Neoh Khoon Lye v Trans-Intan Sdn Bhd* [2002] 6 MLJ 8 magnanimously allowed the purchasers there to claim for LADs to be used as set-offs of the purchase prices. In other words, the plaintiffs here need not pay the purchase price in full before claiming for LAD.

[38] It is absurd to ask the plaintiffs to pay the purchase price in full before claiming for LAD because the plaintiffs have terminated the SPA. Upon termination of the SPA, there is obviously no obligation on the part of the plaintiffs to pay any part of the purchase price let alone the full purchase price.

[39] All the issues raised by the defendant are without merits. They are all issues of law which this court can easily adjudicate in deciding the application for summary judgment. All these issues have already been decided by other judges in other cases, (see *Bank Negara Malaysia v Mohd Ismail & Ors*). And these are certainly not issues which require a full trial for this court to determine.

CONCLUSION

[40] For the reasons adumbrated above, I gave an order in terms of encl 6 especially prayer (a), prayer (b) (here to follow para 8(b) of encl 23), prayer (c), prayer (d) (here to follow para 8(d) of encl 23), prayer (e) (here to

follow para 8(e) of encl 23), prayers (f), (g), (h), and (i). The case management in encl 7 is now made superfluous.

Order accordingly.

Reported by Brendan Navin Siva